No. 94-518

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

VINCENT E. ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction, on his guilty plea, of consensual sodomy, in violation of Article 125 of the Uniform Code of Military Justice, 10 U.S.C. 925, violated a constitutional right to privacy.

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OPINIONS BELOW

The order of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a) summarily affirming the decision of the Navy-Marine Corps Court of Military Review is unreported. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 4a-7a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 28, 1994. The petition for a writ of certiorari was filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993) and 10 U.S.C. 867a(a).

STATEMENT

After entering guilty pleas, petitioner, a member of the United States Navy, was convicted by a general court-martial, the military judge sitting alone, of nine offenses, including three offenses against Petty Officer Catherine Holt, his former girlfriend: consensual sodomy, assault and battery, and indecent acts, in violation of Articles 125, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925, 928, and 934.[1] Petitioner was sentenced to a bad-conduct discharge, confinement for 30 months, reduction to the lowest enlisted grade, and forfeiture of pay and allowances. The Navy-Marine Corps Court of Military Review affirmed. Pet. App. 4a-7a. The Court of Military Appeals granted discretionary review of one issue and affirmed the judgment of the Navy-Marine Corps Court of Military Review. *Id.* at 1a. The Court of Military Appeals denied petitioner's petition for reconsideration of its limited grant of discretionary review. *Id.* at 2a.

1. Petitioner was originally charged with violating UCMJ Article 125, 10 U.S.C. 925, by committing sodomy with Petty Officer Holt "by force and without [her] consent."[2] Pursuant to a pretrial agreement, however,

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[1] Petitioner also was convicted, on guilty pleas, on two specifications of willfully disobeying an order, in violation of UCMJ Article 91(3), 10 U.S.C. 891(3); violating a lawful general order by possessing a knife, brass knuckles, and ammunition, in violation of UCMJ Article 92(1), 10 U.S.C. 892(1); two specifications of assault and battery against two service members, in violation of UCMJ Article 128, 10 U.S.C. 928; and assaulting a service member, in violation of UCMJ Article 134, 10 U.S.C. 934.

[2] Article 125 of the UCMJ, 10 U.S.C. 925, provides:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same

petitioner agreed to plead guilty to consensual sodomy with Petty Officer Holt, in exchange for the prosecutor's agreement not to go forward with the charge of forcible sodomy. Appellate Exh. I (at 1). The pretrial agreement permitted the prosecution to present evidence of the aggravating circumstances of the sodomy offense at sentencing. R. 57.

During the plea colloquy between petitioner and the military judge regarding the sodomy charge, petitioner claimed that Petty Officer Holt had taken his penis into her mouth voluntarily. R. 37. During the sentencing portion of the court-martial, Petty Officer Holt testified for the prosecution as follows. R. 99. She and petitioner had been living together in a romantic relationship. R. 101. On December 15, 1991, she told petitioner that she wanted to end the relationship and live separately. R. 107-110. Petitioner became enraged and hit her several times with his fist; he also masturbated until he ejaculated on her. R. 111-116.[3]

Eventually, petitioner agreed to leave if Petty Officer Holt allowed him to take her dog with him "as an assurance that he could come back." R. 117. When Petty Officer Holt refused, petitioner said that he would leave only if she performed fellatio on him. She began crying and told him that she did not want to do that. She began to scream, but no one responded. She believed that petitioner "was either gonna hurt [her], [or] * * * hurt

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or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

[3] Those actions were the basis for the assault and battery charge and the indecent act charge against petitioner.

[her] animals." R. 120. She could not leave the apartment, because petitioner was blocking the door. Believing she had no other choice, she performed fellatio on petitioner. R. 120-121.[4]

2. The Navy-Marine Corps Court of Military Review affirmed petitioner's sodomy convictions and sentence. Pet. App. 4a-7a.

3. The Court of Military Appeals granted review of one issue raised by petitioner, not the issue presented here (Pet. App. 3a), and affirmed (*id.* at 1a).[5] The court denied petitioner's request for reconsideration of its order granting limited discretionary review. *Id.* at 2a.

ARGUMENT

Petitioner contends that his conviction of consensual sodomy violates his constitutional right to privacy. That contention does not warrant further review.[6]

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[4] The military judge considered Petty Officer Holt's testimony only in determining the circumstances of the consensual sodomy offense and its impact on Petty Officer Holt, and not as evidence of the greater offense of forcible sodomy. R. 129.

[5] The Court of Military Appeals granted review of what petitioner designated "Issue IV," in which he asserted: "The Court-Martial did not have jurisdiction because the military judge was not appointed to a fixed term of office." Pet. App. 5a n.1. The question petitioner presents in this Court was designated "Issue III" in the Court of Military Appeals. See *ibid.*

[6] We note that this Court may lack jurisdiction to review petitioner's contention on certiorari. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. V 1993), provides that the Court "may not review by a writ of certiorari under this section any action of the Court of Military Appeals in refusing to grant a petition for review." Here, the Court of Military Appeals in this case did not grant review of the question presented in the petition, although it did grant review of a different question. See Pet. App. 3a. In any event, even if the Court has jurisdiction to review the question presented here, the fact that the question was not addressed by the

1. Petitioner waived any right to challenge his conviction of consensual sodomy by unconditionally pleading guilty to that offense. A criminal defendant who pleads guilty on the advice of competent counsel "waives all challenges to the prosecution except those going to the court's jurisdiction." *United States* v. *Waters*, 23 F.3d 29, 36 (2d Cir.), cert. denied, 115 S. Ct. 185 (1994). That waiver extends to challenges based on the Constitution. See, *e.g.*, *ibid.* (Ex Post Facto Clause challenge); *United States* v. *Stewart*, 972 F.2d 216, 217 (8th Cir. 1992) (Fourth Amendment challenge to trial evidence seized in a search); see also *United States* v. *Broce*, 488 U.S. 563, 569-574 (1989) (collateral challenge based on Double Jeopardy Clause); *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973) (collateral challenge based on allegedly unconstitutional composition of grand jury). Petitioner does not contend that his trial lawyer provided constitutionally deficient representation; that his challenge is jurisdictional; or that in pleading guilty he reserved the right to seek appellate review of the issue presented here. See Rule of Courts-Martial 910(a)(2) (permitting conditional pleas of guilty); cf. Fed. R. Crim. P. 11(a)(2). Under those circumstances, petitioner relinquished any right to seek further review of his sodomy conviction.

2. Petitioner urges this Court to grant review to resolve the "split among the various state and federal jurisdictions" (Pet. 4) on the question whether, consistently with constitutional protections of privacy, a person can be criminally punished for engaging in "private, noncommercial, consensual, adult, heterosexual oral sex" (Pet. i). This Court should decline to do so.

Court of Military Appeals in the first instance weighs against review by this Court.

First, that question is not presented here. The conduct for which petitioner was convicted was not consensual; petitioner forced Petty Officer Holt to perform fellatio on him. See pp. 3-4, *supra*. Petitioner does not, and cannot, claim that such non-consensual conduct is protected by the Constitution.[7]

Second, even if this case involved consensual sodomy, it would not provide an appropriate vehicle for resolving the asserted split. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker* v. *Levy*, 417 U.S. 733, 758 (1974). A decision by this Court in this military case therefore would not necessarily resolve the asserted split among the civilian courts.

3. Finally, petitioner contends (Pet. 8-9) that the Court of Military Appeals has erred by relying on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), to uphold convictions for consensual heterosexual sodomy in prior cases. This Court denied further review in one such case, *United States* v. *Fagg*, 34 M.J. 179 (C.M.A.), cert. denied, 113 S. Ct. 92 (1992), and there is no reason for a different course here. The Court of Military Appeals has correctly relied on *Bowers* v. *Hardwick* in prior cases to determine the proper framework for deciding whether members of the military have a fundamental consti-

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[7] Because petitioner bases his challenge on substantive due process, rather than the First Amendment, he cannot argue that, even though his own conduct is not constitutionally protected, the UCMJ's sodomy provision is unconstitutionally overbroad because it applies to consensual sodomy. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-611 (1973); cf. *Parker* v. *Levy*, 417 U.S. 733, 758-761 (1974). At any rate, petitioner does not make an overbreadth argument.

tutional right to engage in consensual heterosexual sodomy. See *United States* v. *Henderson*, 34 M.J. 174, 177-178 (1992). The court's holding in *Henderson* that there is no such right, which rested on the court's determination that the particular activity at issue "has been openly and expressly prohibited in the armed forces of the United States since time immemorial," *id.* at 176, does not warrant further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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